

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Elise M. Hiljus, Complainant

ORDER OF DISMISSAL

v.

Jonathan Glassel, Respondent

On October 25, 2012, Elise M. Hiljus filed a Complaint with the Office of Administrative Hearings alleging that Respondent Jonathan Glassel violated the Fair Campaign Practices Act.

This matter came before Administrative Law Judge Eric L. Lipman for the second of two probable cause hearings on November 15, 2012.

Elise M. Hiljus, appeared on her own behalf and without counsel. Jonathan P. Glassel appeared on his own behalf and without counsel

The Complaint alleges that a September issue of Mr. Glassel's publication, the *Chisago County Epitaph*, qualifies as false campaign material in violation of Minn. Stat. § 211B.06. Specifically, the Complaint alleges that Mr. Glassel prepared and disseminated a copy of the *Epitaph* which asserted that Darrell Trulson "has never been elected to public office," at a time when Mr. Glassel knew that Mr. Trulson had been earlier-elected as a Library Trustee for the Library Board of the Village of Arlington Heights, Illinois. Mr. Trulson was a candidate for election as a County Commissioner of Chisago County at a time that this assertion was circulated.

By way of an order dated October 26, 2012, the Administrative Law Judge determined that Ms. Hiljus had set forth enough facts in her complaint to state that a violation of law had occurred. The probable cause hearing was held to determine whether there was a dispute requiring resolution at an evidentiary hearing.

Based upon the Complaint and the hearing record and for the reasons set forth in the Memorandum below:

IT IS ORDERED:

1. Ms. Hiljus' Complaint is **DISMISSED**.

Dated: November 28, 2012

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

NOTICE OF RECONSIDERATION AND APPEAL RIGHTS

Minnesota Statutes § 211B.34, subdivision 3, provides that the Complainant has the right to seek reconsideration of this decision on the record by the Chief Administrative Law Judge. A petition for reconsideration must be filed with the Office of Administrative Hearings within two business days after this dismissal. If the Chief Administrative Law Judge determines that the assigned Administrative Law Judge made a clear error of law and grants the petition, the Chief Administrative Law Judge will schedule the complaint for an evidentiary hearing under Minnesota Statutes § 211B.35 within five business days after granting the petition.

If the Complainant does not seek reconsideration, or if the Chief Administrative Law Judge denies a petition for reconsideration, then this order is the final decision in this matter under Minn. Stat. § 211B.36, subd. 5, and a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69

MEMORANDUM

Factual Background

This case is the third in a series of suits under the Fair Campaign Practices Act that involves the election of a County Commissioner to the Chisago County Board from District No. 1. The candidates for election to this office in 2012 were the incumbent, Lora Walker, and her challenger, Darrell Trulson.

In March of 1993, Mr. Trulson was elected to the office of "Library Trustee" for the library system that serves the Village of Arlington Heights, Illinois.¹

In 1993, the balloting for local offices in the Village of Arlington Heights included elections for the office of both "Village Trustee" and "Library Trustee." These are distinct offices for different units of local government.²

Commissioner Walker sent a public record request to the Village of Arlington Heights inquiring as to Mr. Trulson's service as an official in that community. By way of electronic mail messages on August 23, 2012, Lisa A. Farrington, a Staff Attorney and FOIA Officer made three replies that morning to Commissioner Walker – the first at 8:43 a.m., the second at 8:55 a.m. and the last at 10:00 a.m. The communiques read:

Good morning,

We received your request for agenda and minutes. We have never had a Darryl Trulson on our Village Board.

Sincerely,

Lisa A. Farrington
Staff Attorney
FOIA Officer³

Good morning,

I apologize for answering hastily. We are checking to see if Darryl Trulson served on the Board before 1990. I will get back to you as soon as possible.

¹ Exhibits E and F.

² See, *Glassel v. Trulson*, OAH Docket No. 8-0325-23144-CV (2012) (<http://mn.gov/oah/images/032523144-glassel-trulson-order.pdf>).

³ Ex. C.

Sincerely,

Lisa A. Farrington
Staff Attorney
FOIA Officer⁴

Good morning,

We have confirmed that Darrel Trulson did not serve on the Village Board (see E-mail below). He did, however, serve on the Arlington Heights Memorial Library Board which is a separate government entity. The library board maintains a website at: <http://ahml.info> and you can contact them for agenda and minutes for their Board.

Sincerely,

Lisa A. Farrington
Staff Attorney
FOIA Officer⁵

Mr. Glassel acknowledges that he received a copy of the first of the three E-mail communications sent by Ms. Farrington to Commissioner Walker, in mid-September of 2012. He initially received a copy of the first message from persons other than Commissioner Walker, but later received a "confirmatory copy" of the same from her.⁶

Shortly after receipt of the copy of the first message from Commissioner Walker, Mr. Glassel published a critique of Mr. Trulson's qualifications for election in the *Epitaph*, stating in part: "Darrell has never been elected to public office or proven his leadership ability in any discernible fashion."⁷

⁴ Ex. D.

⁵ Ex. E.

⁶ Testimony of Jonathan Glassel.

⁷ Test. of J. Glassel. Mr. Glassel likewise filed a Fair Campaign Practices Act claim against Mr. Trulson, on the grounds that Trulson's violated Minn. Stat. § 211B.06 by falsely claiming to have been elected a "Trustee" in the Village of Arlington Heights, Illinois. See, *Glassel v. Trulson*, OAH Docket No. 8-0325-23144-CV (2012) (<http://mn.gov/oah/images/032523144-glassel-trulson-order.pdf>).

Mr. Glassel has maintained this same statement in an electronic version of the *Epitaph*, posted to the Internet, notwithstanding the fact that Glassel learned in late September that Mr. Trulson was earlier-elected to the office of “Library Trustee.”⁸

Additionally, Mr. Glassel does not recall receiving copies of the latter two messages until the probable cause hearing in *Glassel v. Trulson*, OAH Docket No. 0325-30009; the second of the three rounds of Fair Campaign Practices Act litigation. The probable cause hearing in that matter was held on October 3, 2012.⁹

Analysis

A. Probable Cause Standards

The purpose of a probable cause hearing is to determine whether there are sufficient facts in the record to believe that a violation of law has occurred as alleged in the Complaint. The Administrative Law Judge must decide whether, given the facts disclosed in the record, it is fair and reasonable to require the respondent to address the claims in the Complaint at a hearing on the merits.¹⁰ The Office of Administrative Hearings looks to the standards governing probable cause determinations under Minn. R. Crim. P. 11.03 and by the Minnesota Supreme Court in *State v. Florence*.¹¹

If the Judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, were one to be made, a motion to dismiss for lack of probable cause should be denied.¹² A judge’s function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony.

⁸ Test. of J. Glassel; Order of Dismissal, *Glassel v. Trulson*, OAH Docket No. 8-0325-23144-CV (2012) (<http://mn.gov/oah/images/032523144-glassel-trulson-order.pdf>) (Mr. Glassel argued “that because Mr. Trulson has frequently used the term ‘Trustee’ in lieu of ‘Library Trustee,’ in both print and campaign appearances, Trulson intended to falsely claim an office that he never held”).

⁹ Test. of J. Glassel; Order of Dismissal, *Glassel v. Trulson*, OAH Docket No. 0325-30009 (2012) (<http://mn.gov/oah/images/032530009-Glassel%26Trulson.pdf>).

¹⁰ *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

¹¹ *Id.*; see also Black’s Law Dictionary 1219 (7th ed. 1999) (defining “probable cause” as “[a] reasonable ground to suspect that a person has committed or is committing a crime”).

¹² *State v. Florence*, at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party’s favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

B. Standards for Assessing False Literature Claims

Minn. Stat. § 211B.06 prohibits the preparation and dissemination of false campaign material. The prohibition has two elements: (1) A person must intentionally participate in the preparation or dissemination of false campaign material; and (2) the person developing or disseminating the material must know that the item is false, or act with reckless disregard as to whether it is false.

As to the first element of the statute, the test is objective: The statute is directed against false statements of fact. The statute does not proscribe criticism of candidates that is merely unfair or uncharitable.¹³ Indeed, this statute is set against the backdrop of the First Amendment; which assures Americans in the public square sufficient “breathing space” to assemble data, construct arguments and present conclusions to their fellow citizens.¹⁴ The statute does not punish poor reasoning, but instead relies upon voters to discern the merits of arguments made in campaign brochures.

With respect to the second element of the statute – namely, Glassel’s awareness of whether Trulson had earlier been elected to public office – the test is subjective: OAH inquires into whether the Respondent “in fact entertained serious doubts” as to the truth of the publication or acted “with a high degree of awareness” of its probable falsity.¹⁵

Section 211B.06 closely tracks the standard for actual malice.¹⁶ Actual malice can be shown if the statement was fabricated by the respondent, was the product of the respondent’s imagination or was based on an unverified source.¹⁷ As the U.S. Supreme Court explained in *St. Amant v. Thompson*:

¹³ *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

¹⁴ See, *Boos v. Barry*, 485 U.S. 312, 322 (1988), (“[I]n public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment”); *State v. Machholz*, 574 N.W.2d 415, 422 (Minn. 1998) (“Commenting on matters of public concern is a classic form of speech that lies at the heart of the First Amendment, and speech in public arenas is at its most protected on public sidewalks, a prototypical example of a traditional public forum”) (citing *Schenck v. Pro-Choice Network of Western N. Y.*, 519 U. S. 357, 377 (1997)).

¹⁵ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W. 2d 379 (Minn. App.) review denied (Minn. 2006).

¹⁶ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (defining “actual malice” as acting “with knowledge that [the statement] was false or with reckless disregard of whether it was false or not”); *Fitzgerald v. Minn. Chiropractic Ass’n, Inc.*, 294 N.W.2d 269, 270 (Minn. 1980) (defining “actual malice” as “either actual knowledge of the falsity of the publication or reckless disregard of whether it is false or not”).

¹⁷ *Chafoulis v. Peterson*, 668 N.W.2d 642, 654-55 (Minn. 2003) (“[A] ‘highly slanted perspective’ . . . is not enough by itself to establish actual malice”); accord, *Stokes v. CBS, Inc.*, 25 F. Supp. 2d 992, 1004 (D. Minn. 1998).

Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications, as well as true ones....

Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.¹⁸

In this case, the evidence demonstrates that Mr. Glassel received the first of the three Farrington E-mails, stating that “[w]e have never had a [Darrell] Trulson on our Village Board,” and that Glassel was eager to frame information about Mr. Trulson uncharitably in the pages of the *Epitaph*.¹⁹

However, this falls short of the evidence required to proceed to a hearing before a three-judge panel. There is not a reasonable ground to believe that Glassel knew of Trulson’s election as a Library Trustee when Glassel published his claim, or that he did not care whether or not Trulson had been elected when he circulated the *Epitaph*.

Glassel’s claim about Trulson’s prior public service, while factually incorrect, was based on the first of the Farrington electronic messages. Mr. Glassel was permitted, under the First Amendment, to infer from Farrington’s statement “[w]e have never had a Darryl Trulson on our Village Board,” that Mr. Trulson had never been elected to any public office. While such a leap may appear “extreme and illogical,” Mr. Glassel is legally entitled to share that reading of the Farrington message with the public.²⁰

Being incorrect is not a basis for liability under the False Campaign Practices Act. Because there is no statutory requirement “that campaign material be thorough or complete,”²¹ Ms. Hiljus has failed to establish probable cause that Mr. Glassel violated Minn. Stat. § 211B.06.

Lastly, Ms. Hiljus’s argument that Mr. Glassel was under a continuing duty to correct inaccurate campaign-related statements on his website, is not availing.

¹⁸ See, *St. Amant v. Thompson*, 390 U.S. at 732.

¹⁹ Testimony of Elise Hiljus; Test. of J. Glassel.

²⁰ *Kennedy v. Voss*, 304 N.W.2d 299, 300 (Minn. 1981).

²¹ See, *Selcer v. Republican Party of Minnesota*, OAH 0320-30104 (2012) (Minn. Stat. § 211B.06 does not require those who circulate campaign literature “to be certain before speaking” or to give opponents “the benefit of the doubt”) (<http://mn.gov/oah/images/0320-30104-SelcervRepublicanParty.pdf>).

Because Minn. Stat. § 211B.06 is a criminal statute, and regulates political speech, it is to be read narrowly and in favor of those in the public square.²² The Administrative Law Judge is unwilling to read into the statute a legal duty to continually revise previously-published items as new facts are learned – a potentially burdensome obligation for those who engage in political speech.²³

This case is a close one, however, because Mr. Glassel's writings recall the recklessness described by the Court in *St. Amant v. Thompson*. Indeed, Glassel uses many of the practices that the Court says are signs of a publisher who acts in bad faith, intending to injure his targets. At the probable cause hearing, Mr. Glassel testified that he often receives "leads" for stories from anonymous E-mails sent to him by persons unknown and that he regards the moniker "opinion and commentary" as disclaiming any factual errors that appear in issues of the *Epitaph*.²⁴ Moreover, he is unwilling to adjust his website to correct matters that he knows to be inaccurate.²⁵

This conduct continues today, even after the general election balloting was concluded. In a pre-hearing filing, Mr. Glassel asserted that Mr. Trulson was involved in a meretricious affair with a campaign volunteer. Glassel made this breathtaking claim based upon a photograph in which Trulson is shown standing next to the volunteer, in a parade unit on a city street, and the "things" that others have told Glassel.²⁶

While Mr. Glassel's methods are not actionable, it does say volumes about his work as a "journalist"²⁷ and "publisher," and why readers should approach the *Epitaph* with real caution. The cure for the shortcomings in the content and completeness of Mr. Glassel's writings, however, is more speech by Mr. Trulson and his supporters.²⁸

²² See, *Citizens United v. F.E.C.*, 130 S. Ct. 876, 898 (2010) ("The First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office"); *F.E.C. v. Wisconsin Right to Life*, 551 U.S. 449, 457 (2007) (The "First Amendment requires [tribunals] to err on the side of protecting political speech rather than suppressing it," particularly in the context of campaigns for public office); *State v. Stevenson*, 656 N.W.2d 235, 238 (Minn. 2003) (The rule of lenity states that "[w]hen the statute in question is a criminal statute, courts should resolve ambiguity concerning the ambit of the statute in favor of lenity"); see also, Footnote 14, *supra*.

²³ See, *Citizens United*, 130 S. Ct. at 895-96 ("onerous restrictions thus function as the equivalent of prior restraint by giving [government agencies] power analogous to licensing laws implemented in 16th- and 17th-century England, laws and governmental practices of the sort that the First Amendment was drawn to prohibit").

²⁴ Test. of J. Glassel.

²⁵ *Id.*

²⁶ See, Ex. 1; Test. of J. Glassel.

²⁷ Test. of J. Glassel.

²⁸ See, *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements which "told only one side of the story," or were "unfair" or "unjust," without being demonstrably false, were not prohibited by the Fair Campaign Practices Act, and subject to cure by an incumbent who "was able to discuss and publicize his rebuttal to the charges made").

The appropriate result is dismissal of the Complaint.

E. L. L.